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No. 83-276

In The

Supreme Court of the United States

October Term, 1983

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

vs.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.,
Appellees.

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

vs.

BRADLEY BOE, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Minnesota

[redacted] SWARTHMORE COLLEGE, HAVERFORD COLLEGE, OBERLIN COLLEGE AND EARLHAM COLLEGE, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

and

BRIEF OF SWARTHMORE COLLEGE, HAVERFORD COLLEGE, OBERLIN COLLEGE AND EARLHAM COLLEGE, AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

1. Whether Section 1113 of the Department of Defense Authorization Act of 1983 violates the right to equal protection under the due process clause of the Fifth Amendment.

2. Whether Section 1113 of the Department of Defense Authorization Act of 1983 violates the rights to freedom of association and free speech protected by the First Amendment.

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Swarthmore College, Haverford College, Oberlin College and Earlham College ("amici") respectfully move this Court for leave to file the attached BRIEF OF SWARTHMORE COLLEGE, HAVERFORD COLLEGE, OBERLIN COLLEGE AND EARLHAM COLLEGE, AS AMICI CURIAE IN SUPPORT OF APPELLEES. The grounds for this Motion are stated below.

I. The Parties To This Appeal Have Consented To The Filing Of This Brief.

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, Swarthmore College has, on behalf of all the colleges joining this brief, requested and received consent for the filing of this brief from the appellants, Selective Service System, *et al.* ("the government") and from the appellees, Minnesota Public Interest Research Group, *et al.* and Bradley Boe, *et al.* Letters memorializing their consent have been appended hereto. *See* App. A, *infra.*

II. Interest Of Amici.

The amici are all small, independent, co-educational liberal arts colleges, and each of them presently participates in federal educational assistance programs provided under Title IV of the Higher Education Act of 1965, 20 U.S.C. 1070 *et seq.* All of the colleges are subject to Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.* ("Section 1113"), and if the statute's constitutionality is sustained, they will be required to enforce it by obtaining certifications of registration compliance from their students who apply for federal financial assistance.

Since educational costs are significantly greater at these colleges than at most other private colleges and universities around the country, and since each of the colleges is committed to the goal of attracting a diverse student body representing a wide range of socioeconomic backgrounds, a high proportion of the students attending these colleges need some form of federal financial aid. For example, in the academic year 1982-83, 58% of Swarthmore's students received Title IV federal assistance. At

Oberlin, 60% of all students receive some form of federal financial assistance. Both the colleges and their students will be directly affected by Section 1113 if it is allowed to stand.

In addition, several of the amici, for historical reasons, are particularly sensitive to a statutory requirement which indirectly aids the processes of military conscription. Swarthmore, Haverford, and Earlham Colleges, for example, were founded by members of the Religious Society of Friends (Quakers), a religious group committed to pacifism.

As non-sectarian institutions, these colleges enroll students of various backgrounds and faiths, some of whom conscientiously object to military service. Section 1113 will have a profound impact on the character of these colleges' learning environments and will violate First Amendment rights, as discussed in the attached brief.

Furthermore, the administrative burden imposed on all amici by the regulations issued by the Department of Education to implement Section 1113 (issued April 11, 1983, 48 Fed. Reg. 15578), when fully phased in two years from now, will be enormous. Under the present regulations, colleges will then be required not only to obtain certifications of registration from applicants for federal financial assistance, but also to collect evidence verifying that the certifications are accurate. The amici certainly would be willing to undertake such administrative burdens if they served a valid educational purpose. However, the duties imposed by Section 1113 bear no perceivable relation to any legitimate educational goal.

For these and other reasons, amici are deeply concerned about the outcome of this case, and have a significant stake in it.

III. Questions That Have Not Been Adequately Presented.

Appellees have thoroughly treated the issues on which the District Court's decision rests, namely, whether Section 1113 is an unconstitutional bill of attainder and whether it violates students' privilege against self-incrimination. Amici agree with appellees and the District Court on those issues and do not propose to discuss them here.

However, neither the government nor the appellees have adequately addressed certain other issues of constitutional import that bear directly on the outcome of this case. Specifically, amici believe that Section 1113 discriminates on the basis of gender and that it lacks a sufficient governmental interest to support resort to such a disfavored classification. This defect, moreover, is exacerbated by the fact that Section 1113 operates to deprive certain students of their quasi-fundamental right to an education. Finally, Section 1113 abridges rights of academic freedom and association that are guaranteed by the First Amendent. Although the District Court did not rely on these factors in striking down the statute, they are additional grounds for affirmance.

For the foregoing reasons, we respectfully ask the Court's leave to file the attached brief addressing the important equal protection and First Amendment issues at stake in this litigation.

Respectfully submitted,

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STATEMENT OF THE CASE

Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.* (codified at 50 U.S.C. App. 462(f)) ("Section 1113"), imposes a new and unparalleled burden on students seeking

federal educational assistance and on the colleges and universities that participate in federal aid programs. Such assistance has long been available under Title IV of the Higher Education Act of 1965, 20 U.S.C. (and Supp. V) 1070 *et seq.* Under the terms of Section 1113, students required to register for military service under Section 3 of the Military Selective Service Act, 50 U.S.C. App. (Supp. V) 453, are ineligible for federal educational assistance under Title IV unless they have complied with the draft registration requirement. All students, whether subject to the provisions of the Military Selective Service Act or not, are required, pursuant to the Section 1113 regulations, to file statements of registration compliance prior to receiving Title IV funds.

Appellees, who are college students and a student organization, brought an action in the United States District Court for the District of Minnesota seeking to enjoin Section 1113 as unconstitutional. On June 16, 1983, the District Court entered a final judgment and decree declaring Section 1113 unconstitutional and enjoining its enforcement. On June 29, 1983, this Court stayed the District Court's June 16 order, thus permitting Section 1113 to go into effect. The government then brought an appeal directly to this Court pursuant to 28 U.S.C. 1252, and on December 5, 1983, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

There is no question that the sole purpose behind Section 1113 is to aid in the enforcement of the draft registration law by punishing college students who have failed to register by denying them federal financial aid. Amici believe that such intertwining of draft registration and education is unconstitutional.

Section 1113 endangers the diversity of college student bodies by curtailing the ability of certain groups of male students—such as those with limited financial resources and those holding dissident pacifist views — to attend. Further, by making colleges and universities central to the enforcement of its provisions, the statute has imposed significant burdens on all higher educational institutions. Such burdens are constitutionally offensive when, as here, they are imposed for no educational purpose.

Section 1113 thus impairs the freedom of our institutions of higher learning. The statute isolates particular groups of male students for special, adverse treatment in an area — education — totally unrelated to the objective of military conscription that the statute is designed to advance. At the same time, Section 1113 forces the colleges and universities to adopt a posture with their students which is at best unrelated to their educational pursuits, and at worst makes that relationship adversarial.

As a result, the statute violates both the principles of equal protection embodied in the concept of due process, and the guarantees of free expression and association under the First Amendment.

ARGUMENT

I. Section 1113 Violates The Principles Of The Equal Protection Clause

A. Section 1113's Classification Based On Gender Cannot Survive The Strict Scrutiny Such Classifications Require.

Section 1113 denies federal education assistance to any individual required to register with the Selective Service who does not do so. Since only males must register, *Rostker v. Goldberg*, 453 U.S. 57 (1981), the provision penalizes only male students. While male-only draft registration has been constitutionally approved, *Rostker, supra*, Section 1113 impermissibly extends this gender classification into the areas of eligibility for federal education assistance, an area in which gender is irrelevant and any classification based thereon is constitutionally objectionable.

This Court held in *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980), that a gender-based distinction can only be supported by a showing that it serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." The fact that "this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 (1982)

(footnotes omitted). Thus, the gender classification in this statute must be supported by an "exceedingly persuasive justification." *Id.* at 724.

There is no such justification in this case. In *Rostker*, this Court held that gender differences influence combat roles and military needs, and therefore justify all-male draft registration. Those distinctions have no relationship to the allocation of educational financial aid funds, which is the issue here. This is "a case of Congress arbitrarily choosing to burden one of two similarly situated groups." *Rostker, supra,* at 78.

For purposes of federal financial assistance to college students, any distinction based on gender is invidious. There can be no question that in this case, unlike the case in *Rostker, supra,* men and women are similarly situated; and the "Constitution requires that Congress treat [such] similarly situated persons similarly." *Id.* at 79.[1] Section 1113 neither treats people similarly nor is it based on any sound policy justifying the gender classification. Therefore, the statute must be stricken for violating the principles of equal protection.

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[1] Various members of Congress recognized that Section 1113 unjustifiably discriminates on the basis of gender. Representative Patterson, for example, commented:

> [T]his amendment is highly discriminatory. Since only males are required to register for the draft, and since needy students are the recipients of student aid assistance, it punishes our country's needy, male students.

Cong. Record H4760 (daily ed. July 28, 1982) (Rep. Patterson).

B. Section 1113 Unconstitutionally Burdens The Quasi-Fundamental Right To Education, And Therefore Should Be Subject To Heightened Scrutiny.

Additional infirmities of Section 1113 are revealed in light of this Court's recent decision in *Plyler v. Doe*, 457 U.S. 202 (1982). Section 1113 unjustifiably burdens the ability of students to obtain access to education, recognized in *Plyler* as a quasi-fundamental right.

This Court has "treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (footnotes omitted). The Court also has not hesitated to strike down laws that unfairly burden a "significant interest," without requiring the interest to be a "fundamental right." *See, e.g., Bearden v. Georgia*, — U.S. —, 103 S. Ct. 2064, 2072 (1983) (poor probationer's interest in staying out of jail); *Plyler, supra.*

In *Plyler*, this Court established the constitutional importance of the right to education, albeit at the elementary level:

> Public education is not a "right" granted to individuals by the Constitution. *San Antonio School District, supra*, 411 U.S., at 35. *But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation.* Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The "American people have always regarded education and the acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). We have recognized "the public schools as a most vital civic institution for the preser-

> vation of a democratic system of government," *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (BRENNAN J., concurring), and as the primary vehicle for transmitting "the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). As noted early in our history, "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are able to preserve freedom and independence." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." *Ambach v. Norwick, supra*, 411 U.S., at 77. *In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.*

Plyler, supra, at 221 (emphasis added). The *Plyler* Court rejected the notion that "a concern for the preservation of resources standing alone could justify the classification used in allocating those resources. . . . [The legislature] *must do more than justify its classification with a concise expression of an intention to discriminate.*" *Plyler, supra*, at 227 (emphasis added).

As Justice White has recognized, the same importance attaches, and consequently a higher level of review is appropriate, in cases involving higher education:

> Here, *it is enough for me that the interest involved is that of obtaining a higher education*, that the difference between in-state and out-of-state tuition is substantial, and that the State, without sufficient

> justification, imposes a one-year residency requirement on some students but not on others, and also refuses, no matter what the circumstances, to permit the requirement to be satisfied through bona fide residence while in school. It is plain enough *that the State has only the most attenuated interest in terms of administrative convenience in maintaining this bizarre pattern of discrimination* among those who must or must not pay a substantial tuition to the University. The discrimination imposed by the State is invidious and violates the Equal Protection Clause.

Vlandis v. Kline, 412 U.S. 441, 459 (1973) (White, J., concurring) (emphasis added).

This case raises precisely the kinds of questions *Plyler* addressed. Section 1113 burdens the quasi-fundamental right of one group in our society — financially needy males — to obtain a college education on the same basis as all other groups.[2] The reasons for this denial

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[2] That the statute falls most heavily upon the financially needy was well-recognized in Congress. According to Representative Moffett, for example, Section 1113

> . . . is blatantly discriminatory. Only low-income and middle-income students will be caught in this trap. If a student comes from a wealthy background, is capable of financing his education privately, [Section 1113] does not punish him. However, if a student is poor or from a middle-income background, the full force of [Section 1113] is applied.

Cong. Record H4758 (daily ed. July 28, 1982). Indeed, Representative Solomon, the bill's sponsor, recognized the legislation's impact upon financially needy students. Cong. Record H4767 (daily ed. July 28, 1982).

In addition to its impact upon the needy, Section 1113 also discriminates against minorities, since minority students receive a disproportionately large share of all federal financial aid. As much as 49.5 percent of all federal aid

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have nothing to do with educational policy. There is no justification for the blatant discrimination Section 1113 requires. Furthermore, there are already effective and constitutional means of enforcing the draft law which do not involve invidious distinctions: 50 U.S.C. App. 462(a) prescribes a penalty of 5 years in prison, a $10,000 fine, or both, for those who fail to register.

The right to an education is too basic; the governmental need for this discrimination is too tenuous. The Court must not permit the misuse of educational policy to meet external goals without a stronger need and a better justification than the government can demonstrate in this case.

II. Section 1113 Unconstitutionally Infringes Rights Guaranteed By The First Amendment.

A. The Statute Interferes With Freedom Of Association And Speech In Colleges And Universities.

This Court long has recognized that the rights of free speech and assembly afforded by the First Amendment entail a constitutionally protected right to freedom of association. *See, e.g., Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971); *NAACP v. Button*, 371 U.S. 415, 430 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S.

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under the four post-secondary student aid programs is received by nonwhites. United States Department of Education, Office of Student Financial Assistance, *O.S.F.A. Program Handbook* 16 (1982) (data for 1978-79 academic year). Nonwhites nevertheless account for less than 14 percent of all college students. Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract 159-60 (1982).

449 (1959). Nowhere is this right more essential to American democracy than it is on college and university campuses. As this Court declared in *Healy v. James*, 408 U.S. 169, 180-81 (1972):

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The college classroom with its surrounding environs is peculiarly the " 'marketplace of ideas,' " and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

See also Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) ("The essentiality of freedom in the community of American universities is almost self evident.")

Because of this constitutionally based commitment to academic freedom, governmental interference in the academic process has been sharply limited. The government may punish neither students nor teachers for their peaceful political expression. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977); *Tinker v. Des Moines School District*, 393 U.S. 503, 513 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Nor may they be punished for their political associations. *Healy v. James, supra; Sweezy v. New Hampshire, supra.* In addition, the government is not permitted to restrict what ideas may be taught or expressed, either in the name of some official dogma or to enforce popularly held notions of moral-

ity or patriotism. *Epperson v. Arkansas,* 393 U.S. 97 (1968); *West Virginia v. Barnette,* 319 U.S. 624 (1943); *Meyer v. Nebraska,* 262 U.S. 390 (1923). The danger recognized in all these decisions is that the government, if it is permitted to interfere at will with academic processes, will "cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents, supra,* 385 U.S. 589, 603.

These fundamental rights are held not only by the individual students and teachers, but also by the academic institutions themselves. In his concurrence in *Sweezy v. New Hampshire,* for example, Justice Frankfurter recognized four essential freedoms of a college or university which are protected by the First Amendment: the right "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 354 U.S. at 263 (quoting a statement of senior South African scholars). Preserving these freedoms requires "the exclusion of governmental intervention in the intellectual life of a university," because "[a] university ceases to be true to its own nature if it becomes the tool of . . . [the] State." *Id.* Justice Frankfurter's view of the First Amendment protections afforded to colleges and universities was reaffirmed and extended in *Board of Regents v. Bakke,* 438 U.S. 265 (1978). There, Justice Powell, writing for a plurality of the Court, recognized that the First Amendment right to academic freedom includes a right of colleges and universities to a "diverse" student body. *Id.* at 311-12.

Section 1113 infringes these fundamental rights in three important ways. First, the statute interferes with the colleges' ability to determine whom they will enroll.

Second, the statute interferes with the academic process itself by disrupting the atmosphere of free exchange between the student and the administration/faculty. Finally, the statute may affect the First Amendment rights of some faculty and administrators by imposing legal duties, enforceable by criminal penalties, to assist in the process of conscription.

By restricting the availability of federal assistance, Section 1113 is designed to and will impair the ability of certain students — those either unable or unwilling as a matter of conscience to meet the certification requirements — to attend the college of their choice. Particularly at schools such as amici, where tuition costs are high, colleges may be forced to turn away students whom they would otherwise enroll; while students may be forced to select colleges other than those they would prefer to attend, or sometimes to forgo attendance at college altogether.

Section 1113 thus adversely restricts diversity in college student bodies. Additionally, Section 1113's impact will fall most greatly on those who, for reasons of conscience, are opposed to draft registration. The result will be a loss in diversity of viewpoints, particularly those critical of national war and defense policies.

Beyond its adverse impact upon the colleges' right to determine whom they will enroll, Section 1113 will also affect daily academic life. The statutory duty placed upon colleges and universities to assist the federal government in its law enforcement activities by obtaining certifications, and ultimately verifications, of registration introduces an alien element into the educational process. Rather than serving their proper function, col-

lege faculty and administrators involved in carrying out this law will be forced into the mold of "informants" — collectors and reporters to the government of information, unrelated to education, that could subject some students to criminal penalties.[3] Furthermore, they are required to assist the federal government in punishment, solely on the basis of legislatively presumed conduct outside the college walls, of students who are opposed to draft registration, in circumstances where the college's intrusion into student privacy bears no relationship to educational goals.[4] Although this impact is likely to be felt by all institutions of higher education, it is particularly strong on colleges which, like some of the amici, have historically resisted governmental intrusion in academic affairs, have

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[3] See note 5, *infra*. This effect will become particularly harsh in 1985 when the regulations issued under Section 1113, see 48 Fed. Reg. 15578 (April 11, 1983), take full effect. At that point the colleges will be required not only to obtain student certifications of compliance, but also to obtain evidence verifying the certifications.

[4] If Section 1113 is permitted to stand, Congress will be free to enact a broad array of similar measures, in each forcing the colleges and universities, in the guise of administrators of a benefits program, into the odious position of being forced to withhold educational assistance based on presumed personal behavior inconsistent with popular social mores. For example, Congress could then require, as conditions for student assistance, that colleges obtain certifications from their students that they had never engaged in any act of civil disobedience, that they had never participated in any unlawful demonstration or civil disturbance, that they had never unlawfully received medicaid funds or food stamps, or that they had never obtained unlawful abortions. Such measures, like Section 1113, would introduce an air of suspicion in the relations between students and their colleges that could seriously impair the free flow of ideas and viewpoints in the college environment, without advancing any goal even remotely related to higher education.

followed a policy of non-alignment with governmental defense policies, and have enrolled students with conscientious objections to armed conflict and military conscription.

Finally, by forcing colleges to assist in the process of military conscription, Section 1113 may interfere with the First Amendment rights of faculty and administrators who conscientiously object to military participation. These individuals will be faced with the difficult choice of either refusing to participate in the verification process — a refusal creating potential criminal liabilities for the individuals involved,[5] as well as the loss of critical educational funding for the institution — or surrendering their own personal religious or moral convictions. To the extent this occurs, the colleges' associational rights with these individuals will also be infringed.

B. Section 1113's Impact Upon First Amendment Freedoms Cannot Be Justified.

Because protected rights of expression and association are infringed, Section 1113 cannot be sustained un-

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[5] 50 U.S.C. 462(a) provides in part:

> "Any . . . person charged . . . with the duty of carrying out any of the provisions of this title or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person who shall knowingly make . . . any false statement or certificate regarding or bearing upon a classification . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment . . . ."

less it is supported by "an important or substantial governmental interest" which is "unrelated to the suppression of free expression," and unless circumscription of First Amendment rights is "no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1969). *See also Elrod v. Burns*, 427 U.S. 347, 360-63 (1976); *Healy v. James, supra.* Section 1113 clearly fails this test.

Here, the burden upon First Amendment freedoms is significant. Because federal educational assistance has become vital to the financing of higher education, particularly in private institutions, forgoing participation in Title IV would seriously impair a college's ability to attract the students it wishes to enroll, while continuing in the program will infringe its associational rights. Moreover, since participation in the registration compliance program requires college intrusion into students' personal affairs and personal beliefs, students will certainly be chilled from seeking advice or counseling regarding registration; and they may also be chilled from participating in draft protest activities or otherwise engaging in criticism of American military policies for fear that these activities, too, will lead to withdrawal of financial aid. The whole tenor of student relations with their college will be changed by the fact that the college has been forced to become an investigating unit serving the federal government and, more particularly, the Selective Service System.

Against these significant burdens on academic freedom, Section 1113 fails to serve any compelling state interest. It is no defense to argue, as the government does, that the legislation merely conditions the conferring of a privilege or benefit that the government may allocate

as it chooses. To the contrary, it has long been recognized that even where governmental benefits are involved, strict scrutiny of the justifications for conditioning those benefits in a manner that interferes with First Amendment freedoms is required. *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234 (1977); *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963); *Speiser v. Randall*, 357 U.S. 513, 518, 526 (1958). "The Constitution's protection is not limited to direct interference with fundamental rights." *Healy v. James, supra*, 408 U.S. at 183. As the Court stated in *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960): "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental influences."

The only legitimate interest the government can assert for this legislation is keeping track of draft registrants.[6] This purpose is insubstantial. Beyond that, it can easily be accomplished by less cumbersome and less intrusive means. Neither college investigation of its students nor a condition for educational assistance eligibility is needed. Indeed, requiring certificates of registration only from college aid applicants makes no sense because they represent but a small portion of the total pool of

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[6] The government's purported justifications of "encouraging" draft registration and denying federal support to "lawbreakers" are not adequate purposes supporting this legislation. Amici agree with appellees and the District Court that in actuality the statute is a legislatively determined punishment amounting to an unconstitutional bill of attainder, so that the purported military justification is constitutionally unsupportable. Furthermore, any "encouragement" of draft registration is speculative and will be extremely limited in scope, since it will affect only financially needy male college students, a small segment of the draft age male population.

draft registrants, and there is no reason to require information from them that is not required from others.

In sum, precious First Amendment freedoms of colleges and universities, their students, faculty, and administrators are jeopardized by Section 1113's addition of draft registration compliance to the requirements for eligibility for funds under Title IV. There is no compelling or substantial reason why these rights must be infringed. Accordingly, the guarantees of the First Amendment are an additional ground for holding Section 1113 unconstitutional.

CONCLUSION

For the reasons stated above, the decision of the United States District Court for the District of Minnesota should be affirmed.

Respectfully submitted,

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APPENDIX A

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL

Washington, D.C. 20530

December 29, 1983

Thomas P. Preston, Esq.
Duane, Morris & Heckscher
One Franklin Plaza
Philadelphia, PA 19102

Re: Selective Service Systems, et al.
v. MPIRG, et al., No. 83-276

Dear Mr. Preston:

In response to your letter of December 20, 1983, I hereby consent, on behalf of the federal parties, to the filing of a brief amicus curiae in the Supreme Court of the United States on behalf of Swarthmore College in the above case.

Sincerely,

/s/ Rex E. Lee
Solicitor General

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December 29, 1983

Thomas P. Preston, Esq.
Duane, Morris & Heckscher
One Franklin Plaza
Philadelphia, Pennsylvania 19102

Re: Selective Service Systems, et al.
vs. MPIRG, et al.

Dear Mr. Preston:

On behalf of our clients, John Doe, Paul Poe, and Richard Roe, appellees in the above-referenced action, we agree not to oppose the joint petition of Swarthmore

College and other colleges and universities for leave to participate as *amici curiae* in that action.

Very truly yours,

/s/ James E. Dorsey III
for DORSEY & WHITNEY

JED:pro
cc: E. Gail Suchman, Esq.

MINNESOTA PUBLIC INTEREST
RESEARCH GROUP

2412 University Avenue Southeast
Minneapolis, Minnesota 55414
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January 5, 1984

Thomas P. Preston, Esq.
Duane, Morris & Heckscher
One Franklin Plaza
Philadelphia, Pennsylvania 19102

Re: *Selective Service Systems, et al. v. MPIRG, et al.* U.S. Sup. Ct. No. 83-276

Dear Mr. Preston:

This is to inform you, on behalf of our clients, the Minnesota Public Interest Research Group, Bradley Boe, Carl Coe and Frank Foe, appellees in the above-captioned action, that we have no objection to the joint petition of Swarthmore College and other colleges and universities for leave to participate as *amici curiae* in that action.

Very truly yours,

/s/ E. Gail Suchman
Counsel for Minnesota Public
Interest Research Group,
Bradley Boe, Carl Coe and
Frank Foe

cc: William Keppel, Esq.

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL

Washington, D.C. 20530

January 18, 1984

Thomas P. Preston, Esq.
Duane, Morris & Heckscher
One Franklin Plaza
Philadelphia, Pennsylvania 19102

Re: Selective Service Systems, et al. v. Minnesota Public Interest Research Group, et al., No. 83-276

Dear Mr. Preston:

As requested in your letter of January 13, 1984, I hereby consent to the filing of a brief *amicus curiae* on behalf of Hampshire College, Oberlin College, Wellesley College, Haverford College, and Earlham College.

Sincerely,

/s/ Rex E. Lee
Solicitor General